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80-2221

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL CONSULTANTS, INC.,

Petitioner,

-against-

H.S. EQUITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(11087)

QUESTIONS PRESENTED

1. Whether the courts below failed to apply the federal rule of non-retroactivity with respect to the petitioner?

2. Whether the courts below failed to apply the Oklahoma rule of non-retroactivity with respect to the petitioner?

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IN THE

SUPREME COURT OF THE UNITED STATES

INDUSTRIAL CONSULTANTS, INC.,

Petitioners,

-against-

H.S. EQUITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, H.S. Equities, Inc., prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit rendered on April 3, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet officially reported appears at Appendix A, infra, pp. 1a-16a. The order of the United States District Court for the Southern District of New York, Griesa, J. not officially reported, appears at Appendix A, pp. 17a-29a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 3, 1981. See Appendix A pp. 1a-16a. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254 (i).

RELATED STATUTES

Section 98 of Title 12 of the Oklahoma Statutes at the time of the

accrual of the subject cause of action provided:

> "If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state; or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought, notwithstanding the provisions of Title 12, §§141, 187 and 1701.01 to 1706.04, inclusive, and title 47, §§391, 392 and 393 to 403, inclusive, of the Oklahoma Statutes, or any other statutes extending the exercise of personal jurisdiction of courts over a person or corporation based upon service outside this state, or based upon substituted service upon an official of this or any other state of nation."

STATEMENT OF FACTS

Petitioner, Industrial Consultants, Inc. ("Industrial") is an Oklahoma corporation. On February 6, 1970, representatives of H.S. Equities, a New York Stock Exchange member firm, then known as Hayden, Stone, Inc. met with a group of Oklahoma investors in Oklahoma City, one of whom was petitioner's president, Jack Golson. The purpose of the meeting was to induce the investors to become subordinate lenders to H.S. Equities.

On March 13, 1970, petitioner through its president, agreed to purchase a subordinated debenture of H.S. Equities in the amount of $720,000. The consideration for the debenture was to be a demand note secured by a pledge of

200,000 shares of the common stock of L.S.B. Industries, Inc. (L.S.B.). Mr. Golson executed the agreement and an amended agreement in Oklahoma and also delivered the promissory note in that State. In April 1970, appellant delivered the L.S.B. stock to appellee in New York.

At the end of April, 1970, petitioner's president learned about certain false and misleading representations which were made at the March 13, 1970 meeting. In negotiations that followed, petitioner was able to substitute $378,000 in cash for the L.S.B. stock pledged as collateral. Petitioner's demand note was called in August, 1970, and the cash collateral was applied towards its payments.

Petitioner commenced this action on March 11, 1976, alleging

common law fraud and violations of section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.R.F. §240.10b-5 (1980). The district court entered an order on April 16, 1980 which granted H.S. Equities' motion for summary judgment on the ground that the action was barred by Oklahoma's two-year statute of limitations. (See Appendix pp.a 17-a29.

Petitioner appealed and, on April 3, 1981, the United States Court of Appeals for the Second Circuit affirmed the order of the district court. The appellant court held that the Oklahoma two year statute of limitations applied, and further that the statute of limitations was not tolled pursuant to a tolling provision relied upon by the

petitioner but declared unconstitutional by the Oklahoma Supreme Court in Wright v. Keiser, 568 P. 2d 1262 (Okla. 1977) one year after the instant action was commenced.

JURISDICTION BELOW

The jurisdiction of the district court was based upon Section 22 of the Securities Act of 1933, as amended, 15 U.S.C. §78v, Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa and principles of pendant jurisdiction.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Failed to Apply the Federal Rule of Nonretroactivity.

In 1971, this Court in Chevron Oil Company v. Huson, 404 U.S. 97 (1971) reviewed the history of the doctrine of nonretroactivity and set forth three separate factors to be applied when deciding cases dealing with nonretroactivity.

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra, 392 U.S., at 496, 88 S. Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, 393 U.S., at 572, 89 S. Ct., at 835. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation.'

> Linkletter v. Walker, supra, 381 U.S., at 629, 85 S. Ct., at 1738. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the"injustice or hardship" by a holding of nonretroactivity.' Cipriano v. City of of Houma, supra, 395 U.S., at 706, 89 S. Ct., at 1900." Id. at 107

These three tests have been met by the petitioner herein. The transaction at issue took place in 1970. At that time, and for sixty years prior thereto, the law of the State of Oklahoma was that a cause of action would not run against a person or entity if the alleged wrongdoer was outside the state. 12 Okla. Stats. §98.

In response to the growing trend of long-arm jurisdiction, see, e.g. Jarchow v. Eder, 433 P. 2d 942 (Okla.1967) (holding a defendant "present" if service

could be effected even outside the state) the Oklahoma legislature amended section 98 through emergency legislation, see S. Bill No. 558, ch. 76, §1, Regular Session (Okla. 1970). This amendment nullified the rationale of Jarchow. This new amendment remained unchallenged and uninterpreted until 1977. Relying upon this statute Petitioner commenced this action in 1976. Fifteen months later the Supreme Court of Oklahoma held that this tolling provision was unconstitutional in Wright v. Keiser, 568 P. 2d 19262 (Okla. 1977). Thus, the first test of Chevron Oil is satisfied - the establishment of new law overruling clear past precedent. 404 U.S. 97 at 107.

The second prong of the Chevron Oil three prong test deals with the history and purpose of the prior rule and whether retroactive application would be

useful. The prior history of the tolling provision makes clear that the Oklahoma legislature was seeking to protect its citizens from the tortious acts within the state by non residents by tolling the statute of limitations so long as the tortfeasor was not in the state. To apply Wright v. Kesier, supra, retroactively would be contrary to the very intent of the Legislature which sought to protect the time within which residents could bring suit. Underscoring this is the subsequent enactment by the Oklahoma Legislature on March 26, 1980, some three years after the Wright decision, of legislation codifying the Wright rationale. Most persuasive is effective date of this legislation - October 1, 1980. If the Oklahoma legislature wanted pre-existing cause of action to be affected it would have made

the effective date, June 14, 1977, the date when Wright v. Keiser was decided. On the contrary, the effective date of the legislation was in the future and prospective.

The third prong of the test imposed by this Court in Chevron Oil, requires a litigant to show "injustice or hardship" or "substantial inequitable results" if retoractivity was applied. In the matter at bar the petitioner's right to bring suit would be retroactivity time-barred. No greater hardship could be imposed on this petitioner - denying it, retroactively, the right and access to seek redress of alleged wrongs.

The factual similarity between Chevron Oil v. Huson and the matter at bar bears mention. In Chevron Oil an injured offshore oil driller brought suit for damages sustained in 1965 in federal district court in 1968. In 1969, this

Court held in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) that the adjacent state's statute of limitations and not the federal admiralty law would apply to personal injury actions. If the Rodrigue decision were given retroactive effect the injured driller in Chevron Oil - injured three years before the Rodrigue decision and who commenced suit more than one year before the Rodrigue decision - would be time-barred more than two years before the Rodrigue case was ever decided. This Court recognized this inequity and ruled that Rodrigue should be applied prospectively. So too for this petitioner - if Wright v. Keiser is given retroactive effect, the petitioner injured seven years before Wright and who commenced suit more than one year before Wright - would be time-barred more than four years before Wright

was decided. This is clearly not a rational or equitable result.

The failure of the Court of Appeals below to even make reference to this Court's holding in Chevron Oil v. Huson, supra, is inexplicable. As this Court acknowledged, the doctrine of non-retroactivity is not new and first appeared in decisions of the Supreme Court more than a century ago in cases involving nonconstitutional and civil state law. Id. at 107; City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 212 (1970); United States v. Estate of Donnelly, 397 U.S. 286 (1970); Simpson v. Union Oil of Calif., 396 U.S. 13 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Tehan v. United States, 382 U.S. 406 (1966); Jerry Vogel Music Co. v. Edward B. Marks Music Corp., 425 F. 2d 834 (2d Cir. 1969); cf. Kramer v.

Caribbean Mills, Inc., 394 U.S. 823, 830 n. 12 (1969).

The vitality of the Chevron Oil v. Huson decision is without question. A most notable example can be seen in Lemon v. Kurtzman, 411 U.S. 192 (1973) wherein this Court ruled that payments to non-public schools did not have to be refunded despite a prior decision by the Court in the same matter that such payments violated the First Amendment.

> "Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. (citations omitted) But 'in the last few decades, we have recognized the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.' Chevron Oil Co. v. Huson,

> 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed. 2d 296 (1971); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968); Simpson v. Union Oil Co., 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). . . . In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling of judge-made law from the rule that ultimately prevailed. . . . Statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." Id. at 197-199.

See also Kirk v. Rockwell International Corp., 578 F. 2d 814 (9th Cir. 1978); Home Box Office, Inc. v. F.C.C., 567 F. 2d 9 (D.C. Cir. 1977); Action for Children's Television v. F.C.C., 564 F, 2d 458 (D.C. Cir. 1977); DeMatteis v.

Eastman Kodak, 520 F. 2d 409 (2d Cir. 1975).

The petitioner as an individual was entitled to the same considerations as the injured driller in Chevron Oil and the nonpublic schools in Lemon v. Kurtzman. If petitioner is given those considerations a finding of nonretroactivity would result.

II. The Lower Courts Failed to Apply Oklahoma Law of Nonretroactivity.

Under Oklahoma law, an accrued cause of action or right to sue is a constitutionally protected right. Mid-Continent Casualty Company v. P & H Supply, Inc., 490 P. 2d 1358, 1361 (Okla. 1971). Accordingly, a new statute of limitations rule can be constitutionally applied to accrued causes of action only if affected parties are given a reasonable time to bring suit. Wolfe v. Phillips, 172 F. 2d 481, 485 (10th Cir. 1949); Tucker v. McCrory, 266 P. 2d 433, 434-35 (Okla. 1954); Woods v. Phillips Pet. Co., 251 P. 2d 505 (Okla. 1952). This rule applies whether the change in the stataute of limitations occurred by statutory or constitutional interpretation or by amendment by the legislature. As the Oklahoma Supreme Court noted in Bagby v. Martin,

247 P. 404, 406 (Okla. 1926):

> "The law of our state is defined by statute to be the Constitution, the statutes, and common law as modified by judicial decisions. A judicial construction of a statute by the Supreme Court of a state becomes a part of the statute, and operates on property and personal rights with the same degree of force as an unambiguous statute, which does not require judicial construction."

There, the Supreme Court further noted:

> "As to whether a decision by the highest appellate court of a statute should be given retroactive or prospective effect, the Supreme Court of the United States in the case of Douglas v. Pike County, 101 U.S. 677, 25 L. Ed. 968, said:
>
> 'The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive.'" Id. at 407.

The Oklahoma Supreme Court re-

affirmed the nontretroactive rule most

recently in the criminal area in Walton v. State, 565 P.2d 716 (Okla. Cr. 1977) where it stated:

> "It is a general rule of law that decisions of the highest court overruling a prior decision are prospective in application unless specifically declared to have retroactive effect. See Wrone v. Page, Okla. Cr. 481 P. 2d 479 (1971) and West v. State, Okla. Cr. 503 P. 2d 221 (1972)."Id at 718.

Petitioner's cause of action accruing in 1970, after §98 was amended (see p. 10 supra) was entitled to constitutional protection until 1977. This action having been commenced in 1976, the suit was timely brought.

In State v. Board of County Com'rs. of Creek County, 107 P. 2d 542 (Okla. 1940) the Oklahoma Supreme Court held that when a court rules that a statute is unconstituional the statute is treated as voided ab initio. However,

the court then acknowledged that there are "established exception[s] to this general rule." Id. at 547.

Petitioner comes within a recognized exception. One such exception recognized by the Oklahoma Supreme Court is the reliance by the affected party upon the validity of the statute. Id. at 550-51. Illustrative is Board of Com'rs of Pottawatomie County v. A. C. Davis & Sons, 86 P. 2d 782 (Okla. 1939) in which A.C. Davis & Sons, architects, sued to recover on claims for services rendered. The Board of County Commissioners contended that the contract made with the architects was void because the statute authorizing the appropriation of funds to pay the architects was unconstitutional. The Oklahoma Supreme Court held that such defense would not be sufficent to destroy the plaintiff's cause of action:

> "....The presumption is that a law is constitutional until its unconstitutionality is judicially established (State ex rel. Cruse v. Cease, 1911, 28 Okl. 271, 114 P. 251, Ann Cas. 1912D, 151) and the [parties were] entitled to rely on that stat ute as authority for [the Board's] official acts until such time as the statute was declared unconstitutional or until the Board was advised by the proper official of its unconstitutionality.

Id. at 783. Accord, Gordon v. Conner, 80 P. 2d 322 (Okla. 1938); Wade v. Board of Com'rs of Harmon County, 17 P. 2d 690 (Okla. 1932).

Clearly, petitioner was entitled to rely on the validity of the Oklahoma tolling statute. Indeed, the Oklahoma Supreme Court stated in Wright that "[f]or sixty years, this Court has held that within the meaning of §98 (the amendment was added to the original statute adopted in 1910), a defendant was out of the state only when he could not

be served." 568 P. 2d at 1264. With the growth of long arm statutes and commencing in 1967, the Oklahoma Supreme Court tried to limit the tolling effects of Section 98 by Holding that the absence of a defendant would not toll the statute where the defendant could be served despite physicial absence. See, e.g. Jarchow v. Eder, 433 P. 2d 942 (Okla. 1967).

Unhappy with this trend, the Oklahoma legislature amended Section 98 through emergency legislation (see S. Bill No. 558, ch. 76, §1, Regular Session (Okla. 1970)). It is this statute that petitioner properly relied upon. This new enactment remained unchallenged for seven years and was never interpreted in a reported decision until Wright v. Keiser, 568 P. 2d 1262 (Okla. 1977). As noted by Vice Chief

Justice Lavendar, in his dissent in Wright:

> This amendment made ineffective the rational of Jarchow. Public policy was expressed contra to Jarchow by the legislative branch of government. Tolling was allowed under §98 based on one being absent from the state, notwithstanding amenability to service and personal jurisdiction through the 'non-resident motorist act' and the 'long arm statute.'

568 P. 2d at 1268.

Petitioner commenced this action in March, 1976, more than one (1) year prior to Wright.

The Oklahoma Supreme Court has applied the nonretroactivity rule for many years in a variety of factual circumstances, where, such as here, a recent decision represents a sharp change in the law which would have severe impact if applied retroactively. In Gibson v. Phillips University, 158 P. 2d 901 (1949); Board of Equalization v. Tulsa Pythian Benev. Assoc., 158 P. 2d 904 (1949) the issue

was whether charitable organizations could avoid a recent decision changing the applicability of an ad valorem tax after they purchased property. The court held that the tax should be applied prospectively because the decision represented a "sharp change in the rule of taxable status of such properties." 158 P. 2d 902, 903; 158 P. 2d 906. In Oklahoma County v. Queen City Lodge No. 197, 156 P. 2d 340 (1945) the question of taxation of real property owned and partially occupied by the charity was at issue. The court stated:

> "....the overruling of the three decisions above referred to constitutes a definite change in the construction of an important provision of our Constitution.
>
> . . . . .
>
> Though some courts and legal minds differ, we find much respectable authority to the effect that the overruling decision may, in the legal and equitable discretion

> of the court, be made to operate prospectively only. The rule is almost universal in the protection of property and contract rights. We have heretofore adopted that rule and practice in cases considered proper in Bagby v. Martin 118 Okl. 244, 247 P. 404, where many authorities are cited. Id. at 354.

The court thereafter at pages 355-358 discussed at great length the doctrine of retroactivity and concluded not to apply its ruling retroactively because of the severe hardship which would ensue. To the same effect are Yarbrough v. Oklahoma Tax Comm., 193 P. 2d 1017 (Okla. 1947) [decision changing estate and inheritance tax denied retrotactive effect], State ex rel Comm. of Land Office v. Keller, 264 P. 2d 742 (1953) [nonretroactive application where right to property acquired in foreclosure sale], Harness v. Meyers, 228 P. 285 (1930) [nonretroactive application as to proper

manner to appoint guardian] and Fidilety-Phenix Fire Ins. Co. v. Penick, 401 P. 2d 514 (1965) [proper manner of service upon foreign corporation not applied retroactively].

Thus, under the law of Oklahoma, petitioner's reliance upon the existing law at the time this action was commenced and the hardship which will ensue if Wright v. Keiser is applied retroactively, entitles petitioner to relief and to maintain this suit.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 410 - September, Term 1980

(Argued December 10, 1980)
(Decided March 31, 1981)

Docket No. 80-7364

INDUSTRIAL CONSULTANTS, INC., SARA L. VOSS, As Trustee for W.B.VOSS, under a Trust Agreement dated June 30, 1971 and WILLIAM SWISHER,

Plaintiffs,

and

INDUSTRIAL CONSULTANTS, INC.,

Plaintiff-Appellant,

-v.-

H.S. EQUITIES, INC., ALFRED J. COYLE, DONALD R. STROBEN and NEW YORK STOCK EXCHANGE, INC.,

Defendants,

H.S. EQUITIES, INC.,

Defendant-Appellee,

B e f o r e:

LUMBARD, MULLIGAN and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Griesa, J., which granted defendant's motion to dismiss plaintiff's securities fraud action because it was barred by the running of Oklahoma's two year statute of limitations. Affirmed.

IRA W. BERMAN, NEW YORK, N.Y. (BERMAN & ZIVYAK, NEW YORK, N.Y. of Counsel), L. ZIVYAK and JON M. PROBSTEIN, NEW YORK, N.Y. on the brief, for Plaintiff-Appellant.

PETER H. MORRISON, NEW YORK, N.Y. (MORRISON, PAUL & BEILEY, NEW YORK, N.Y. of Counsel), GERALD G. PAUL, NEW YORK, N.Y. on the brief, for Defendant-Appellee.

VAN GRAAFEILAND, Circuit Judge:

This is an appeal from an order of Judge Thomas Griesa of the United States District Court for the Southern District of New York. The order granted defendant-appellee's (H.S. Equities, Inc.) motion for summary judgment on the ground that plaintiff-appellant's (Industrial Consultants, Inc.) action seeking damages for alleged securities fraud was time-barred. Appellant contends that the district court erred in applying Oklahoma's two-year statute of limitations, Okla. Stat. tit. 12, § 95 (1971), rather than New York's six-year statute, N.Y. Civ. Prac. Law § 213 (McKinney 1972). Assuming for the argument that the district court was correct in looking to the Oklahoma statute, appellant contends that the court erred in following a decision handed down by the Oklahoma Supreme Court

one year after this action was begun. The decision declared unconstitutional certain provisions of the Oklahoma law that would have tolled the running of the limitations statute. Finding no merit in either argument, we affirm.

There is no serious dispute as to the facts. Appellant Industrial Consultants is an Oklahoma corporation. All of its shareholders, officers, and directors are residents of that State, and its sole place of business is in Oklahoma City. On February 6, 1970, representatives of H.S. Equities, a New York Stock Exchange member firm, then known as Hayden Stone, Inc. met with a group of Oklahoma investors in Oklahoma City, one of whom was appellant's president. The purpose of the meeting was to induce the investors to become subordinate lenders to H.S. Equities. Appellant contends that false

and misleading representations concerning H.S. Equities' financial condition were made at that meeting.

On March 13, 1970, appellant, through its president, agreed to purchase a subordinated debenture of H.S. Equities in the amount of $720,000. The consideration for the debenture was to be a demand note secured by a pledge of 200,000 shares of the common stock of L.S.B. Industries, Inc. (L.S.B.). Appellant's president executed the agreement and an amended agreement in Oklahoma and also delivered the promissory note in that State. In April 1970, appellant delivered the L.S.B. stock to appellee in New York.

Shortly thereafter, appellant's president learned about the alleged misrepresentations. In negotiations that followed, appellant was able to substi-

tute $378,000 in cash for the L.S.B. stock pledged as collateral. Appellant's demand note was called in August, 1970, and the cash collateral was applied toward its payment.

Appellant commenced this action on March 11, 1976, alleging common law fraud and violations of section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5(1980. The district court granted H.S. Equities' motion for summary judgment on the ground that the action was barred by Oklahoma's two-year statute of limitations. This appeal followed.

In arguing that New York's six-year statute of limitations should apply, appellant advances an argument twice rejected by this Court. Arneil v. Ramsey,

550 F.2d 774, 779-80 (2d Cir. 1977); Sack v. Low, 478 F. 2d 360, 366-67 (2d Cir. 1973). These cases hold that in securities fraud litigation the cause of action for purposes of New York's borrowing statute, N.Y. Civ. Pract. Law § 202 (McKinney 1972), accrues in the state where the loss resulting from the misrepresentation was sustained. The New York courts are in accord. Knieriemen v. Bache, Halsey, Stuart, Shields, Inc., 74 App. Div. 2d 290, 296, appeal dismissed, 50 N.Y. 2d 1021 (1980); see Prefabco, Inc. v. Olin Corp., 71 App. Div. 2d 587, 588 (1978). Appellant, an Oklahoma corporation with Oklahoma shareholders, entered into a purchase agreement in Oklahoma and delivered its demand note in that State. The district court did not err in holding that appellant's loss was sustained in Oklahoma and that its action

was governed by Oklahoma's two-year statute.

Appellant's argument that its action was kept alive by the tolling of the Oklahoma statute was rejected by the district court on the ground that the tolling provisions upon which appellant relied had been declared unconstitutional by the Oklahoma Supreme Court in Wright v. Keiser, 568 P.2d 1262 (Okla. 1977). Appellant contends that the district court erred in following Wright because Wright was decided in 1977 and this action was begun in 1976. We disagree.

Until 1970, Oklahoma's statute of limitations provided in substance that if a person was out of the state when a cause of action against him accrued, or if he left thereafter, the statute would not run against him during the time he

was absent. For many years prior to 1970, the Oklahoma Supreme Court had held consistently that a defendant would be treated as out of the state only when he could not be served. Id. at 1264. The statute would not be tolled if the defendant could be served with process upon which a personal judgment could be rendered. Walker v. L.E. Meyers Construction Co., 53 P. 2d 547, 548 (Okla. 1935). Oklahoma was not alone in so holding. With the burgeoning of long-arm statutes, a majority of the states limited in a smilar manner the tolling effect of absence from the state. Bond v. Golden, 273 F.2d 265 (10th Cir. 1959); Moore v. Dunham, 240 F.2d 198 (10th Cir. 1956); Scorza v. Deatherage, 208 F.2d 660 (8th Cir. 1954); Tublitz v. Hirschfeld, 118 F.2d 29 (2d Cir. 1941). See, Annot. Absence as Tolling Statute

of Limitations, 55 ALR. 3d 1158 (1974).

In 1967, the Oklahoma Supreme Court refused to toll the statute in an action against a nonresident motorist upon whom substitute service could have been made under the State's Nonresident Motorist Act, Okla. Stat. tit. 12, § 141 and Okla. Stat. tit. 47, §§ 391-403. Jarchow v. Eder, 433 P.2d 942 (Okla. 1967). This holding apparently prompted the Oklahoma legislature in 1970 to amend section 98 of its statute of limitations to make the out-of-the-state tolling provisions applicable even where personal jurisdiction of the absentee could be obtained. See Wright v. Keiser, supra, 568 P.2d at 1268 (Lavender, V.C.J., dissenting) (quoting 1970 Okla. Sess. Laws, ch. 76). In amending section 98, the legislature opened the door to due process and equal protection challenges

under both the state and federal constitutions.

Although there are decisions which uphold the tolling of the statute of limitations against absent defendants despite the availability of long-arm jurisdiction, see Hopkins v. Kelsey-Hayes, Inc., 463 F. Supp. 539, 542 (D.N.J. 1978), aff'd, 628 F. 2d 801 (3rd Cir. 1980); Vaughn v. Deitz, 430 S.W. 2d 487, 490 (Tex. 1968), the Oklahoma Supreme Court took a contrary position. Justice Simms, writing for the majority of the Court, said:

> Absent resident defendants and non-resident defendants are as amenable to personal service, or its equivalent, which will subject them to the personal jurisdiction of our courts, as are resident defendants.
>
> . . . . .
>
> No legitimate interest of this State is furthered by denying non-residents and those absent from the State the defense of the bar of the

> statute of limitations and placing them at a disadvantage vis a vis residents.
>
> The classifications of absent and nonresident defendants inherent in the statute, as amended, have no relation to the purpose of the tolling provision. We conclude that the portion of the statute added by amendment in 1970 is unconstitutional as it creates classifications of litigants which are palpably arbitrary. 568 P. 2d at 1265-66.

Justice Simms did not stop there, however, he also said:

> Obviously, in addition to its equal protection infirmities, this statutory provision, which denies certain litigants the benefit of the running of the statute of limitations, raises serious questions of denial of due process under our State Constitution.
>
> For the above and foregoing reasons, the protion of 12 O.S. 1971, §98, added by amendment in 1970, is unconstitutional and the trial court's judgment in that regard is affirmed. Id. at 1267.

Appellant and appellee have argued at length the question whether Wright should be applied retroactively, each of them proceeding on the assumption that a

decision concerning retroactivity would determine both the equal protection and due process issues in the instant case. This assumption is based upon a misconception of the binding effect of Wright on the district court.

The Oklahoma Supreme Court's holding that the tolling provisions, which it struck down, violated the due process clause of the Oklahoma constitution was, of course, binding upon the district court. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547 (1949); Stolberg v. Board of Trustees for the State Colleges, 541 F.2d 890, 894 (2d Cir.), cert. denied, 429 U.S. 897 (1976). If the district court looked only to the state due process issue in deciding H.S. Equities' summary judgment motion, it would have to consider whether the Oklahoma court intended its holding in Wright

to be retroactive.[1]

However, "a federal court [will] not give effect, in either a diversity or nondiversity case, to a state statute that violates the Constitution of the United States." Cohen v. Benefical Industrial Loan Corp., supra, 337 U.S. at 547. Accordingly, if that portion of Wright which found a denial of equal protection was correctly decided, it makes no difference when that decision was made; the district court could follow its teachings.

The district court was not bound to adopt the Oklahoma court's interpretation

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1 Under Oklahoma law, when a statute is ruled unconstitutional, it is void ab initio. State v. Board of County Commissioners, 107 P. 2d 542 546-47 (Okla. 1940). The probabilities are, therefore, that if the Oklahoma Supreme Court was asked to determine whether its holding in Wright was retroactive, it would hold that it was.

of federal constitutional principles, even as applied to Oklahoma statutes. United States v. Bedford, 519 F. 2d 650, 654 n.3 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). On the other hand, the state court's holding was "persuasive authority", Bittaker v. Enomoto, 586 F.2d 400, 402 n.1 (9th Cir. 1978), cert. denied, 441 U.S. 913 (1979), entitled to "great respect", Joseph v. Blair, 482 F. 2d 575, 579 n.4 (4th Cir.1973), cert. denied, 416 U.S. 955 (1974); Smayda v. United States, 352 F. 2d 251, 253 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966). It was particularly persuasive in the instant case, because it depended in large part upon the Oklahoma Supreme Court's intimate knowledge of the operation of Oklahoma's long-arm statutes. We are not prepared to say that the district court erred in following the teaching

of the learned Oklahoma court.

The order appealed from is affirmed.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDUSTRIAL CONSULTANTS, INC., SARAH L. VOSS, As Trustee for W.B. VOSS Under a Trust Agreement dated June 30, 1971, and WILLIAM SWISHER,	:	76 Civ. 1196
Plaintiffs,	:	OPINION
v.	:	
HS EQUITIES, INC., ALFRED J. COYLE, DONALD R. STROBEN and NEW YORK STOCK EXCHANGE, INC.	:	
Defendants.	:	

GRIESA, J.

This is an action under Section 17(a) of the Securities Act of 1933, 15 U.S.C § 77a, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

There were originally three plaintiffs -- Industrial Consultants,

Inc. ("ICI"), Sarah L. Voss, and William Swisher. Four defendants were named in the complaint -- HS Equities, Inc. Alfred J. Coyle, Donald R. Stroven, and New York Stock Exchange, Inc.

HS Equities, Inc. was known as Hayden, Stone Incorporated at the time of the relevant events, and will be referred to in this opinion as "Hayden, Stone."

The claims as to plaintiffs Voss and Swisher were disposed of at an earlier stage. Defendants Coyle and Stroben were never served. The claim against the New York Stock Exchange was dropped.

The claims remaining to be disposed of are those of ICI against Hayden, Stone.

Hayden, Stone has moved for summary judgment dismissing the complaint as time barred. The motion is granted.

The action was commenced on March

11, 1976. The cause of action accrued no later than May 30, 1970. I hold that a two-year Oklahoma statute of limitations is applicable and bars this action.

I.

The relevant facts are as follows. In February 1970 representatives of Hayden, Stone visited Oklahoma City and met with a group of persons known to Hayden, Stone through its investment banking business. Hayden, Stone requested the Oklahoma group to lend Hayden, Stone $20 million worth of securities. The group of potential lenders retained an Oklahoma City attorney, who sent Hayden, Stone a letter of intent dated February 6, 1970. The letter of intent listed the potential lenders, one of whom was Jack E. Golsen. It was indicated that Golsen would lend stock of LSB Industries, Inc. worth $750,000. Golsen

is the principal of plaintiff ICI, although at this stage he was listed in the documents in his individual name..

A Loan Agreement dated Feburary 24, 1970 was signed by Hayden, Stone and by various proposed lenders, including Golsen. The lenders signed the agreement in Oklahoma City. Hayden, Stone signed it in New York.

In early March 1970, representatives of the lenders and Hayden, Stone renegotiated the agreement, in light of the fact that the then form of the agreement had been rejected by the New York Stock Exchange.

A modified arrangement was worked out. The papers submitted on the present motion contain a form of agreement dated March 13, 1970.

The actual agreement relating to Golsen and the LSB shares is not part of

the record on the present motion. The complaint in this case, and the motion papers, speak of the party in interest as being the corporation, ICI, rather than the individual, Golsen. The precise form of agreement, according to the motion papers, was that ICI purchased a subordinated debenture of Hayden, Stone in the principal amount of $720,000, paid for by a demand note, which was secured by 210,000 shares of LSB stock.

The Golsen/ICI agreement was signed in Oklahoma by the lender and in New York by Hayden, Stone.

ICI is an Oklahoma corporation and has its sole place of business in Oklahoma. Jack E. Golsen, the principal of ICI, is a resident of Oklahoma. All of the directors and shareholders of ICI are residents of Oklahoma.

In April 1970 the 210,000 shares of

LSB stock were delivered to Hayden Stone in New York.

Apparently other lenders, aside from ICI, executed the March 13, 1970 agreements and provided securities to Hayden, Stone.

At the end of April, Golsen traveled to New York to attend a meeting at Hayden, Stone. Golsen states in an affidavit that at this time he found out that Hayden, Stone was in dire financial straits and that Hayden, Stone's prior representations regarding its financial condition and future earnings were false. Negotiations in New York ensued, for the purpose of revising the March 13 agreements and keeping Hayden, Stone alive.

Apparently revisions to the March 13, 1970 agreements were arrived at. The record on the present motion contains

little information about these revisions, except for the fact that, on June 30, 1970, Golsen delivered to Hayden, Stone a check for $378,000 in exchange for the 210,000 shares of LSB. The agreement for the substitution of cash for the stock was arrived at in New York. The delivery of the check in exchange for the stock took place in New York. The check was drawn on an ICI account at Franklin National Bank in New York City.

The complaint in this action alleges misrepresentation by Hayden, Stone leading to the March 13, 1970 agreement with ICI. ICI requests damages in the amount of "not less than $362,000." According to ICI's response to Interrogatory 50 of Hayden, Stone, the damages are calculated by taking the $378,000 cash payment and deducting $16,000 in interest which had been paid on the subordinated

debenture by Hayden, Stone.

II.

Since there is no federal limitation governing the federal securities law claims, the state statute of limitations must be used. The state statute of limitations obviously also governs the common law fraud claim.

It is necessary to look first to the New York "borrowing" statute, C.P.L.R. §202, which provides in pertinent part:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued,. . . "

The issue under this statute is framed by the contention of Hayden, Stone that the cause of action accrued in Oklahoma, where a two-year limitation would apply, and by the opposing contention of ICI

that the cause of action accrued in New York, where a six-year limitation would apply.

The Oklahoma statute referred to is 12 Oklahoma Statutes Annotated §95, which provides in pertinent part:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> * * * * * *
>
> Third. Within two (2) years:. . . an action for relief on the ground of fraud -- the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The relevant New York statue is C.P.L.R. §213(9), which provides:

> "The following actions must be commenced within six years:
>
> * * * * * *
>
> 9. an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the

> person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

The federal decisions in this circuit make it clear that in a securities fraud case the place where the cause of action accrues is the place where the injury is suffered -- that is, where the economic impact of the fraud is felt, which is normally the plaintiff's residence. Sack v. Low, 478 F. 2d 360, 366 (2d Cir. 1973); Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977); Bache Halsey Stuart Inc. v. Namm, 446 F. Supp. 692 (S.D.N.Y. 1978); Posner v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1979 Fed. Sec. L. Rep., CCH ¶ 96,843 (S.D.N.Y. 1979).

I hold that the cause of action of ICI accrued in Oklahoma. The facts in the present record demonstrate this

sufficiently to justify summary judgment. As already stated, ICI is incorporated in Oklahoma and has its only place of business in Oklahoma. The principal of ICI, Jack E. Golsen, is an Oklahoma businessman. It is perfectly clear that the economic impact of the loss of ICI's investment in Hayden, Stone was felt by ICI and Golsen in Oklahoma. It is true that certain negotiations took place in New York, and that the delivery of the stock and the subsequent delivery of the $378,000 took place in New York, and that the check for the latter amount was drawn on a New York bank. These circumstances, however, in no way indicate that the basic economic injury was not felt in Oklahoma, where ICI and Golsen were located. I do not read the discussion in Sack v. Low, supra at 368, as requiring a contrary result on the facts in this

case.

Plaintiff relies to some extent on Paragraph 11 of the March 13 agreement which provides:

> "This Agreement shall be construed and enforced in accordance with the laws of the State of New York."

However, this is not an action to construe or enforce the agreement. It is an action for misrepresentation, governed mainly by federal securities law. Paragraph 11 is not applicable in the present case.

This means that the Oklahoma two-year statute of limitations governs. This statute provides for accrual when discovery of the fraud occurs. It is conceded that discovery of the fraud occurred in 1970. This was more than two years before the commencement of this action in 1976. Thus the action is

barred by the Oklahoma statute.

An argument has been made based upon 12 Oklahoma Statutes Annotated § 98, which provides in effect that, if a cause of action accrues against a person who is outside of the state, the period for commencement of the action shall not begin to run until he comes into the state. However, this statute has been delcared unconstitutional by the Oklahoma courts. Wright v. Keiser, (District Court, Oklahoma City, 1975), aff'd, 568 P.2d 1262 (Okla. 1977).

For the foregoing reasons the complaint is dismissed.

So ordered.

Dated: New York, New York
April 14, 1980

/s/
THOMAS P. GRIESA
U.S.D.J.